

## The Great Seal of the State of Arizona is a circular emblem. The outer ring contains the text "GREAT SEAL OF THE STATE OF ARIZONA" at the top and "1912" at the bottom, flanked by two stars. The inner circle features a shield with a landscape scene: a person on horseback, a river, and mountains. Above the shield is a banner with the Latin motto "DITAT DEUS".

Appeals Board No. T-1034930-001-B

In the Matter of:

X EA UI TAX SECTION  
ROBERT J DUNN III  
ASSISTANT ATTORNEY GENERAL  
CFP/CLA  
1275 W WASHINGTON – SITE CODE 040A  
PHOENIX, AZ 85007-2926

Employer

Department

DECISION  
**REVERSED IN PART**  
**SET ASIDE IN PART**

THE EMPLOYER petitions from the Reconsidered Determination issued by the Department on February 13, 2007, which affirmed the Determination of Unemployment Insurance Liability and the Determination of Liability for Employment or Wages, both issued April 7, 2005. Those Determinations held that the Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least \$1,500 in a calendar quarter beginning January 1, 2003, and that services performed by individuals as telemarketing agents, constitute employment, and remuneration paid to those individuals constitutes wages.

The petition for hearing has been timely filed. The Appeals Board has jurisdiction in this matter pursuant to Arizona Revised Statutes § 23-724(B).

At the direction of the Appeals Board, a hearing was held on June 14, 2007, in Phoenix, Arizona, before William E. Good, an Administrative Law Judge, for the purpose of considering the following issues, of which all parties were properly noticed:

1. Whether the employing unit is liable for Arizona unemployment insurance taxes beginning January 1, 2003, under A.R.S. § 23-613.

2. Whether services performed by individuals as telemarketing agents constitute employment as defined in A.R.S. § 23-615, and are not exempt or excluded from coverage under A.R.S. §§ 23-613.01, 23-615, or 23-617.
3. Whether remuneration paid to individuals for such services constitutes wages as defined in A.R.S. § 23-622, which must be reported and on which State taxes for unemployment insurance are required to be paid.

The following persons were present at the hearing:

ROBERT DUNN	Department representative
ALEX FAVELA	Department witness
X	Employer representative and witness
X	Employer witness
X	Employer witness

At the hearing, the witnesses were sworn and testified. Board Exhibits No. 1 through 15 were admitted into the record as evidence.

The APPEALS BOARD FINDS the following facts pertinent to the issues here under consideration:

1. The Employer engaged the services of individuals to perform tasks as telemarketers to convince customers to take tours offered by certain resorts who hoped to sell interest in real property, such as a “time share”, to the potential customers (Tr. pp. 25, 28).
2. The telemarketers received a flat fee from the Employer in the form of a personal business check, for each “customer” that agreed to take the tour, provided the customer fit the resort’s profile. The profile required the customer to be a married couple within a certain age group. If a prospective customer was not accepted by the resort, the telemarketers did not receive any compensation. (Tr. pp. 30-34, 45, 48).
3. All the telemarketers had previously performed the same duties for resorts themselves and, in some

cases, had been employees of a particular resort (Tr. p. 29).

4. The Employer provided the workers with the needs of certain resorts and the worker used their own leads to contact potential customers for the tours (Tr. pp. 27, 33, 62, 63).
5. The resort paid a flat fee to the Employer for each customer. The Employer paid the worker a negotiated flat amount, reserving the difference for itself (Tr. pp. 34, 35).
6. Workers worked from their own homes (Tr. pp. 25, 35, 41).
7. The Employer advised workers of the needs of certain resorts. Workers were free to work on their own if they independently knew of a resort's needs for time share customers (Tr. p. 37).
8. The Employer provided the workers with Federal "Do Not Call" lists so the workers and the Employer would not be liable for calling potential customers who were on the Do Not Call lists (Tr. pp. 31, 37, 40, 41, 60, 61).
9. When a worker arranged a tour, the worker faxed his or her own reservation form to the Employer for transmittal to the resort (Tr. p. 41).
10. The workers did not receive a training guide from the Employer. The Employer did not provide supplies or reimburse workers for expenses which included charges for long distance telephone calls (Tr. pp. 41, 47).
11. Workers were free to perform similar services for other agencies or on their own, if they had some contact with resorts needing the services (Tr. pp. 44-46).
12. Approximately 50 workers performed the telemarketing service for the Employer. They were issued Federal W-9 forms and were given 1099 forms each year (Tr. p. 53).

13. The owner had her own materials to be certain she followed the resort's wishes. Those materials were not given to the workers (Tr. pp. 43, 57, 58, 62).
14. The owner passed along the information to telemarketers she assigned for a particular job so the telemarketers would know what type of potential customers to contact (Tr. pp. 63, 64).
15. The Employer ceased doing business in 2005, after receiving the Notice of Assessment (Tr. pp. 69, 70; Bd. Exh. 6).

The Employer contends that telemarketers, whose employment is in dispute in this case, are independent contractors and not employees.

Arizona Revised Statutes § 23-615 defines "employment:"

"Employment" means any service of whatever nature performed by an employee for the person employing him,

Arizona Revised Statutes § 23-613.01(A) provides:

Employee; definition; exempt employment

A. "Employee" means any individual who performs services for an employing unit and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished, except employee does not include:

1. An individual who performs services as an independent contractor, business person, agent or consultant, or in a capacity characteristics of an independent profession, trade, skill or occupation.
2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit solely because of a provision of law regulating the

organization, trade or business of the employing unit.

3. An individual or class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.
4. An individual if the employing unit demonstrates the individual performs services in the same manner as a similarly situated class of individuals that the federal government has decided not to and does not treat as an employee or employees for federal unemployment tax purposes.

Arizona Administrative Code, Section R6-3-1723 provides in pertinent part:

A. "Employee" means any individual who performs services for an employing unit, and who is subject to the direction, rule or control of the employing unit as to both the method of performing or executing the services and the result to be effected or accomplished. Whether an individual is an employee under this definition shall be determined by the preponderance of the evidence.

1. "Control" as used in A.R.S. § 23-613.01, includes the right to control as well as control in fact.

2. "Method" is defined as the way, procedure or process for doing something; the means used in attaining a result as distinguished from the result itself.

B. "Employee" as defined in subsection (A) does not include:

1. An individual who performs services for an employing unit in a capacity as an independent contractor, independent business person, independent agent, or independent consultant, or in a capacity characteristic of an

independent profession, trade, skill or occupation. The existence of independence shall be determined by the preponderance of the evidence.

2. An individual subject to the direction, rule, control or subject to the right of direction, rule or control of an employing unit ". . . . solely because of a provision of law regulating the organization, trade or business of the employing unit". This paragraph is applicable in all cases in which the individual performing services is subject to the control of the employing unit only to the extent specifically required by a provision of law governing the organization, trade or business of the employing unit.

- a. "Solely" means, but is not limited to: Only, alone, exclusively, without other.
- b. "Provision of law" includes, but is not limited to: statutes, regulations, licensing regulations, and federal and state mandates.
- c. The designation of an individual as an employee, servant or agent of the employing unit for purposes of the provision of law is not determinative of the status of the individual for unemployment insurance purposes. The applicability of paragraph (2) of this subsection shall be determined in the same manner as if no such designated reference had been made.

Arizona Administrative Code, Section R6-3-1723(D)(2) identifies common indicia of control over the method of performing or executing services that may create an employment relationship, i.e., (a) who has authority over the individual's assistants, if any; (b) requirement for compliance with instructions; (c) requirement to make reports; (d) where the work is performed; (e) requirement to personally perform the services; (f) establishment of work sequence; (g) the right to discharge; (h) the establishment of set hours of work; (i) training of an individual; (j) whether the individual devotes full time to the activity of an employing unit; (k) whether the employing unit provides tools and materials to the individual; and (l) whether the employing unit reimburses the individual's travel or business expenses.

Additional factors to be considered in determining whether an individual may be an independent contractor, enumerated in Arizona Administrative Code, Section R6-3-1723(E), are: (1) whether the individual is available to the public on a continuing basis; (2) the basis of the compensation for the services rendered; (3) whether the individual is in a position to realize a profit or loss; (4) whether the individual is under an obligation to complete a specific job or may end his relationship at any time without incurring liability; (5) whether the individual has a significant investment in the facilities used by him; (6) whether the individual has simultaneous contracts with other persons or firms.

In the application of the guidelines set out in Arizona Administrative Code, Section R6-3-1723(D)(2), our analysis includes the following:

a. Authority over Individual's Assistants

Hiring, supervising and payment of the individual's assistants by the employing unit generally shows control over the individuals on the job.

The nature of the services did not require or contemplate the use of assistants.

We find that authority over individual's assistants is not a determinative element in finding that the worker is an employee or an independent contractor.

**It is neutral in this case.**

b. Compliance with Instructions

Control is present when the individual is required to comply with instructions about when, where or how he is to work. The control factor is present if the Employer has the right to instruct or direct.

Here, the individuals worked from their own homes and decided how much work they wished to perform.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

c. Oral or Written Reports

If regular oral or written reports bearing upon the method in which the services are performed must be submitted to the

employing unit, it indicates control in that the worker is required to account for his actions.

No reports were required by the Employer. The only communication about performance was the reservation submittal.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

d. Place of Work

The fact that work is performed off the Employer's premises does indicate some freedom from control; however, it does not by itself mean that the worker is not an employee.

The workers provided their own methods of work free from control by the Employer who was interested only in the result.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

e. Personal Performance

If the service must be rendered personally, this would tend to indicate that the employing unit is interested in the method of performance as well as the result and evidences concern as to who performs the job. Lack of control may be indicated when an individual has the right to hire a substitute without the employing unit's knowledge or consent.

The worker may have had anyone make the telephone calls that would have generated a reservation.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

f. Establishment of Work Sequence

If a person must perform services in the order set for him by the employing unit, it indicates the worker is subject to control as he is not free to follow his own pattern of work, but must follow the routine and schedules of the employing unit.

The sequence of work, after the worker learned of the opportunity, was set by the worker.



We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

g. Right to Discharge

The right to discharge, as distinguished from the right to terminate a contract, is a very important factor indicating that the person possessing the right has control.

Here, there was no evidence that the Employer or the worker could have done other than terminate any contract that may have been formed by the parties.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

h. Set Hours of Work

The establishment of set hours of work by the employing unit is indicative of control. This condition bars the worker from being master of his own time, which is the right of an independent worker.

The worker chose the amount of time spent on performing the services and when the services would be performed.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

i. Training

Training of an individual by an experienced employee working with him, or by required attendance at meetings, is indicative of control because it reflects that the Employer wants the service performed in a particular manner.

The workers here all had prior experience in arranging tours. The Employer did not engage in training.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

j. Amount of Time

If the worker must devote his full-time to the activity of the employing unit, it indicates control over the amount of time the worker spends working, and impliedly restricts him from doing other gainful work. An independent worker, on the other hand, is free to work when and for whom he chooses.

Workers were free to perform services for others or to work on their own for potential clients.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

k. Tools and Materials

If an employing unit provides the tools, materials and wherewithal for the worker to do the job, it indicates control over the worker. Conversely, if the worker provides the means to do the job, a lack of control is indicated.

The workers provided their own equipment and supplies.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

i. Expense Reimbursement

Payment by the employing unit of the worker's approved business and/or traveling expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated when the worker is paid on a job basis and has to take care of all incidental expenses.

Workers absorbed all incidental expenses in performing the work.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

The additional factors enumerated in Arizona Administrative Code, Section R6-3-1723(E) are equally appropriate for consideration in determining the relationship of the parties.

### 1. Availability to the Public

Generally, an independent contractor makes his services available to the general public, while an employee does not.

The workers were free to work for others.

**We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.**

### 2. Compensation

Payment on a job basis is customary where the worker is independent, whereas an employee is usually paid by the hour, week or month.

Here, the workers were paid on a job basis because that was the manner in which the Employer was paid for the services performed

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

### 3. Realization of Profit or Loss

An employee is generally not in a position to realize a profit or loss as a result of his services. An independent contractor, however, typically has recurring liabilities in connection with the work being performed. The success or failure of his endeavors depends in large degree upon the relationship of income to expenditures.

A worker could have realized a loss based on work performed for a client of the Employer, but rejected because the customer did not meet the client's needs. A worker could realize a profit or loss by controlling expenses and performing more work to absorb fixed costs.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

#### 4. Obligation

An employee usually has the right to end the relationship with an Employer at any time without incurring liability. An independent worker usually agrees to complete a specific job.

The parties could end the relationship for any reason. There was no evidence that the parties were prevented from civil actions for breach of the relationship.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

#### 5. Significant Investment

A significant investment in equipment and facilities would indicate an independent status of the individual making the investment. The furnishing of all necessary equipment and facilities by the employing unit would indicate the existence of an employee relationship.

No significant investment was required by either party.

**We do not consider this factor significant in determining whether the parties' relationship was either that of employer/employee or independent contractor.**

#### 6. Simultaneous Contracts

An individual who works for a number of people or companies at the same time may be considered an independent contractor because he is free from control by one company. However, the person may also be an employee of each person or company depending upon the particular circumstances.

The evidence did not establish that the workers had simultaneous contracts, although there was no prohibition on that practice.

We consider this factor significant in determining that the parties' relationship was that of **independent contractor**.

The Arizona Court of Appeals, in the case of Arizona Department of Economic Security v. Little, 24 Ariz. App 480, 539 P.2d 954 (1975), made it clear that all sections of the Employment Security Law should be given its long

established liberal construction in an effort to include as many types of employment relationships as possible, when it stated:

The declaration of policy in the Act itself is the achievement of social security by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment [See A.R.S. § 23-601].

This view was reiterated by the Arizona Court of Appeals, in the case of Warehouse Indemnity Corporation v. Arizona Department of Economic Security, 128 Ariz. 504, 627 P.2d 235 (App. 1981), where it stated:

The Arizona Supreme Court has noted, however, that the Arizona Employment Security Act is remedial legislation. All sections, including the taxing section, should be given a liberal interpretation... (emphasis added).

**The factors that tend to support the Employer's contention of independent contractor relationship include:**

Compliance with Instructions, Oral or Written Reports, Training Compensation, Simultaneous Contracts, Personal Performance, Right to Discharge, Set Hours of Work, Amount of Time, Obligation, Tools and Materials, Realization of Profit or Loss, Place of Work, Establishment of Work Sequence, Expense Reimbursement.

**The factors that are not applicable in this case or are neutral:**

Authority over Individual's Assistants, Significant Investment, , Availability to the Public.

**There are no factors that tend to support an employer/employee relationship.**

We have thoroughly examined the facts present in this case and have considered the relevant law and administrative rules as they are applicable to those facts. We have considered the evidence as it relates to the factors set out in the Arizona Administrative Code, Section R6-3-1723(D) and (E), and conclude that the services performed by individuals as telemarketing agents do not constitute employment.

Having found that services performed by individuals as telemarketing agents do not constitute employment, we set aside that part of the Reconsidered

Determination that found that remuneration paid to individuals for the services performed, constitutes wages. Accordingly,

THE APPEALS BOARD **REVERSES** that part of the Reconsidered Determination issued on February 13, 2007, which found that Employer is liable for Arizona Unemployment Insurance Taxes on the basis of gross payroll of at least \$1,500 in a calendar quarter beginning January 1, 2003, and that services performed by individuals as telemarketing agents, constitute employment.

Services performed by individuals as telemarketing agents do not constitute employment as defined in A.R.S. §§ 23-613.01, 23-615 or 23-617, and such individuals are not employees within the meaning of A.R.S. § 23-613.01 and Arizona Administrative Code, Section R6-3-1723.

THE APPEALS BOARD **SETS ASIDE** that part of the Reconsidered Determination regarding remuneration.

DATED:

APPEALS BOARD

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MARILYN J. WHITE, Chairman

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HUGO M. FRANCO, Member

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WILLIAM G. DADE, Member

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**PERSONS WITH DISABILITIES:** Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will not be able to understand or take part in a program or activity because of your

disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

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### **RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD**

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is \_\_\_\_\_.

### **INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION**

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
  2. Parties may be represented in the following manner:  
  
An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
  3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.
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A copy of the foregoing was mailed on  
to:

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By: \_\_\_\_\_  
For The Appeals Board